

The opinion in support of the decision being entered today
is *not* binding precedent of the Board

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LEONARD R. SOKOLA, SR.

Appeal 2007-2096
Application 10/611,765
Technology Center 1700

Decided: September 11, 2007

Before CHUNG K. PAK, CHARLES F. WARREN, and
CATHERINE Q. TIMM, *Administrative Patent Judges*.

WARREN, *Administrative Patent Judge*.

DECISION ON APPEAL

Applicant appeals to the Board from the decision of the Primary Examiner rejecting for at least the second time claims 1 through 5, 7, 10 through 13, and 16 through 20 in the Office Action mailed April 20, 2006. 35 U.S.C. §§ 6 and 134(a) (2002); 37 C.F.R. § 41.31(a) (2006).

We affirm-in-part the decision of the Primary Examiner.

Claims 1 and 18 illustrate Appellant's invention of a dinnerware article, and are representative of the claims on appeal:

1. A dinnerware article adapted to receive food, the article comprising:

a shallow container with an upper surface having a center, and a lower surface joined to the upper surface at an edge;

a raised likeness of a creature affixed to the upper surface; and

a graphical diet reminder on the upper surface.

18. The article of claim 1, wherein the likeness is hollow and comprises a bottom and a removable top, the likeness adapted to contain at least one pill.

The Examiner relies on the evidence in these references:

| | | |
|----------------------|-----------------|---------------|
| Frucher | US Des. 241,398 | Sep. 14, 1976 |
| Buj | US 4,863,033 | Sep. 5, 1989 |
| Gruneisen III | US Des. 373,930 | Sep. 24, 1996 |
| Strandberg | US D443,176 S | Jun. 5, 2001 |
| Brenkus ¹ | US 6,296,488 B1 | Oct. 2, 2001 |

Appellant requests review of the following grounds of rejection under 35 U.S.C. § 103(a) advanced on appeal (Br. 6):

claims 1 through 5, 7, 10 through 13, and 16, 19, and 20 as unpatentable over Buj in view of Strandberg, Frucher, and Brenkus (Answer 3-4); and

claims 17 and 18 as unpatentable over Buj in view of Strandberg, Frucher, and Brenkus further in view of Gruneisen III (*id.* 4-5).

Appellant argues claims 1 and 16 with respect to the first ground of rejection and claims 17 and 18 with respect to the second ground of rejection (Br. 7, 12, and 13-14). Thus, we decide this appeal based on claims 1 and 16 through 18. 37 C.F.R. § 41.37(c)(1)(vii) (2005).

This panel entered a decision in Appeal No. 2006-0288 on January 4, 2006 in this application. In subsequent prosecution, the Examiner relied on

different prior art. Accordingly, we consider the record anew. *See In re Rinehart*, 531 F.2d 1048, 1051, 189 USPQ 143, 147 (CCPA 1976).

With respect to claim 1, the Examiner finds Buj discloses a plate with a statuette of a dolphin affixed to the upper surface of the plate, which plate differs from the claimed dinnerware article in the absence of a graphical diet reminder on the upper surface (Answer 3). The Examiner finds Strandberg teaches a plate with a graphical diet reminder thereon directed to children; Frucher teaches a plate with a Passover Seder graphical diet reminder thereon; and Brenkus teaches a plate having a number of different shaped compartments for use in a method in which cards with indicia representing food choices are inserted into the corresponding shaped compartments (Answer 3-4). The Examiner concludes it would have been obvious to one of ordinary skill in the art to add graphical diet reminders to Buj's dinnerware as taught by Strandberg, Frucher, and Brenkus in the expectation of providing nutrition education with respect to food choices (*id.* 4). With respect to claim 16, the Examiner contends it would have been obvious to modify the dolphin affixed to Buj's plate with the likeness of a pig as a matter of design choice (*id.*).

With respect to claims 17 and 18, the Examiner finds Buj's dolphin is not hollow and Gruneisen III discloses a container that has a removable basketball on the lip thereof, wherein the basketball is hollow, has a bottom, and a removable top (Answer 4-5). The Examiner concludes it would have

¹ Our review of the official electronic record of the USPTO for this application reveals that Brenkus is not of record. The Examiner should attend to this matter subsequent to the disposition of this appeal.

been obvious to modify Buj's dolphin to obtain a hollow statuette of a dolphin with a removable top with the motivation to provide a separate compartment that can provide storage space (*id.* 5).

Appellant contends there is no motivation to combine the references and there would be no expectation of success in doing so (Br. 7). Appellant contends Buj's plate is used to encourage children to eat and learn to eat, and thus is directed to very young children (*id.* 7-8). Appellant contends that even if a graphical diet reminder was added to Buj's plate, a young child reluctant to eat would not understand such reminder, pointing to Strandberg's use of cartoon images to represent types of food in the food triangle; the figures and food names in English and Hebrew on Frucher's Passover Seder plate; and the food instruction cards for the compartments of Brenkus' plate (*id.* 8-12). Appellant contends the graphical diet reminders on these plates are directed to persons older than small children and thus there is no motivation to combine the references or to modify Buj's plate intended for small children with such graphical diet reminders (*id.*).

Appellant contends with respect to the limitation the creature likeness is that of a pig in claim 16, there is no motivation to substitute a pig for Buj's dolphin because there is no disclosure linking the dolphin with obesity and the purpose of the pig is to connote obesity (*id.* 12-13).

Appellant contends with respect to claims 17 and 18, that Gruneisen III's basketball is not a creature and is used with a tall drink container, not a shallow container, and while shown with "the top hemisphere . . . 'removed for ease of illustration,'" the two hemispheres appear to be molded together do not provide a bottom and a removable top (*id.* 13-14).

The issues in this appeal are whether the Examiner has carried the burden of establishing a prima facie case in each of the grounds of rejection advanced on appeal.

The plain language of claim 1, considered in light of the disclosure in the Specification, specifies any dinnerware article comprising at least any manner of shallow container, such as a plate or bowl, having an upper surface which has affixed a raised likeness of any manner of creature and any manner of graphical diet reminder. Claim 16, dependent on claim 1, specifies the “likeness resembles a pig” in any fashion. Claims 17 and 18, dependent on claim 1, require that the “likeness” is “hollow” in a manner “adapted to contain at least one pill,” with claim 18 further specifying the “likeness” has “a removable top.” *See, e.g., In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364, 70 USPQ2d 1827, 1830 (Fed. Cir. 2004); *In re Morris*, 127 F.3d 1048, 1054-055, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997); *In re Zletz*, 893 F.2d 319, 321-22, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989).

We agree with the Examiner’s findings of fact to which we add the following: We find Buj would have disclosed to one of ordinary skill in this art a plate “to facilitate the feeding of children” which can have any ornamental or toy figure mounted thereon and is visually attractive (Buj, e.g., col. 1, ll. 5-13 and 52-53, col. 1, l. 67, to col. 2, l. 3, col. 2, ll. 24-31, and col. 2, l. 51, to col. 3, l. 13). We find Strandberg would have disclosed to one of ordinary skill in this art a plate with foods of the well known food pyramid graphically represented by cartoon characters which would be visually attractive to children. We find Frucher would have disclosed to one of ordinary skill in this art a plate with graphical representations of Passover

Seder foods which would be visually attractive to children. We find Brenkus would have disclosed to one of ordinary skill in this art a plate with shaped compartments which can receive on their upper surface correspondingly shaped cards with diet reminder information graphically set forth thereon. We find Gruneisen III would have disclosed to one of ordinary skill in this art a basketball drink container which has situated on the rim thereof a miniature basketball. Gruneisen III describes the miniature basketball in part in Fig. 7 in “top plan view inside the bottom hemisphere thereof, the top hemisphere removed for ease of illustration,” and in Fig. 8 in “bottom plan view inside the top hemisphere thereof, the top hemisphere removed for ease of illustration;” the miniature basketball otherwise depicted as a whole without apparent means to separate the hemispheres (Gruneisen III Figs. 1-6).

Appellant acknowledges in the Specification that “[n]ovelty dinnerware” takes many forms, “is commonly produced for the amusement of children, and sometimes adults,” can “include images of cartoon characters or other graphics attractive to children,” and can be “designed with a serious message and with an adult consumer in mind, or with the intention of instructing a child (or adult) in some serious pursuit” (Specification 1).

We determine the combined teachings of Buj, Strandberg, Frucher, and Brenkus, the scope of which we determined above, provide convincing evidence supporting the Examiner’s case that the claimed invention encompassed by claims 1 and 16, as we interpreted this claim above, would have been prima facie obviousness of to one of ordinary skill in the novelty

dinnerware arts familiar with graphically representing information on dinnerware, including plates and bowls.

We cannot agree with Appellant that one of ordinary skill in this art would not have combined Buj, Strandberg, Frucher, and Brenkus, and thus would not have been led to include graphical diet remainders on the upper surface of Buj's plate such as that shown by Strandberg, Frucher, and Brenkus. Indeed, Strandberg depicts cartoon characters and Frucher depicts other graphic forms, both of which convey information which is attractive to children but which, like the printed information on Brenkus' cards, can be used to instruct the child. We find no limitation in the claims with respect to either the age of a person using the claimed dinnerware or the ability of a person to assimilate and use information graphically presented on the surface of the dinnerware to select proper foods or otherwise alter the diet. Thus, Appellant's contention that there would be no reasonable expectation of success in this latter respect is not persuasive as well.

Furthermore, we notice that one of ordinary skill in the art following the teachings of Buj would use other creatures instead of a dolphin as a toy figure on the plate, as this person would have known that the association of a pig with eating has long been a staple in children's literature and generally in society,² and indeed, a pig is depicted in the cartoon representation of a food in Strandberg's food pyramid. Thus, we are of the opinion that one of

² In this latter respect, we notice the slang term "pig out" which is defined as "To eat ravenously; gorge oneself: *'a parent who asks a child, 'Would you like to pig out on pizza?'*' (George F. Will)." *The American Heritage Dictionary of The English Language* 1330 (4th ed., Boston, Houghton Mifflin Company. 2000).

ordinary skill in this art would have employed a likeness of a pig instead of a dolphin.

Accordingly, we are of the opinion that one of ordinary skill in this art armed with the knowledge in the art, routinely following the combined teachings of Buj, Strandberg, Frucher, and Brenkus would have reasonably arrived at the claimed dinnerware article encompassed by claims 1 and 16, including all of the limitations thereof arranged as required therein, without resort to the disclosure in Appellant's Specification. *See, e.g., KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1741, 82 USPQ2d 1385, 1389 (2007) (analysis supporting obviousness should "identify a reason that would have prompted a person of ordinary skill in the art to combine the elements" in the manner claimed); *In re Kahn*, 441 F.3d 977, 985-88, 78 USPQ2d 1329, 1334-337 (Fed. Cir. 2006); *In re Keller*, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981) ("the test [for obviousness] is what the combined teachings of the references would have suggested to those of ordinary skill in the art").

Accordingly, based on our consideration of the totality of the record before us, we have weighed the evidence of obviousness found in the combined teachings of Buj, Strandberg, Frucher, and Brenkus with Appellant's countervailing evidence of and argument for nonobviousness and conclude that the claimed invention encompassed by appealed claims 1 through 5, 7, 10 through 13, and 16, 19, and 20 would have been obvious as a matter of law under 35 U.S.C. § 103(a).

We cannot reach the same conclusion with respect to the ground of rejection of claims 17 and 18. Like Appellant, we determine Gruneisen III

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would not have disclosed to one of ordinary skill in the art a hollow toy figure which can be opened and closed in the manner of a shallow container, and thus in a manner adapted to contain a pill.

Accordingly, in the absence of evidence to support the Examiner's prima facie case of obviousness, we reverse this ground of rejection.

The Primary Examiner's decision is affirmed-in-part.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED-IN-PART

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